III. THE PSC'S FACTUAL FINDING THAT SWBT VOLUNTARILY AGREED TO OFFER NETWORK ELEMENTS IN COMBINATION IS NEITHER ARBITRARY NOR CAPRICIOUS.

In the original Interconnection Agreement, SWBT agreed that, when AT&T seeks to use network element in combinations, SWBT will not separate elements that are already combined in its network and will connect elements that are not already combined. The PSC did not require SWBT to include these terms in the Agreement. Rather, the provisions were the product of negotiations between the parties, and reflect SWBT's desire to minimize direct CLEC access to the equipment and facilities that make up its network.[9] SWBT executed the Agreement containing these terms on October 9, 1997, almost three months after the Eighth Circuit vacated FCC rules that required ILECs to combine elements on behalf of CLECs.[10] In the decision below, the PSC properly rejected SWBT's attempt to renege on its contractual obligations, finding, just as the Texas Public Utilities Commission found, that SWBT had voluntarily agreed to combine network elements even though it was not obligated to do so. That factual finding was neither arbitrary nor capricious and should be upheld, just as the factual finding of the Texas PUC was upheld against the same baseless challenge that SWBT raises here. SWBT v. AT&T Communications of the Southwest, Inc., No. A98-CA-197 SS, slip op. at 4-6 (W.D. Tex. Nov. 9, 1998) at 4-6; see also, MCI Telecomm.v. PacBell, No. C97-0670SI, slip. op. at 28-29 (N.D. Cal. Sept. 29, 1998).

In the arbitration proceedings below, the PSC ruled early on that "there shall be no restrictions or limitations on CLEC use of UNEs [unbundled network elements]." December 11,

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[9] *See generally*, MoPSC Case No. TO-97-40, Commissioner's Examination of SWBT Witness Deere, Tr. 1231, and surrounding discussion (October 16, 1996).

[10] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997).

1996 Arbitration Order at 13 (R. 951). As a result, the parties took it as given that AT&T was not required to own its own network facilities before it could use SWBT network elements. Accordingly, the parties proceeded to develop contract terms that would permit AT&T to use all of the UNEs needed to provide a finished service to customers. During the course of those negotiations, SWBT's willingness to do the combining activity (and to leave intact already-combined elements) was never an issue. Instead, the parties differed over the functionality and performance of the elements that AT&T would use in combination -- e.g., when AT&T uses a loop and switch port in combination, would AT&T have access to the mechanized loop testing capability of the switch that SWBT uses to test equivalent loops for its retail customers (UNE Parity Issue 7) -- and over certain details of the UNE ordering process. (E.g., Operations Issues 2 and 3). See Amended Statement of Issues Remaining at 12, 13, 20 (R. Doc. #00015). But SWBT never proposed, and the parties never contemplated, that AT&T would have direct access to SWBT's network facilities to place physical or electronic connections between SWBT-supplied elements. To the contrary, SWBT had made quite clear its desire to avoid or restrict direct CLEC access to its network facilities, in Missouri[11] and elsewhere. See SWBT v. AT&T Communications of the Southwest, Inc., at 4 ("SWBT made a knowledgeable business decision during the arbitration process to offer to voluntarily combine network elements"). The original AT&T/SWBT Interconnection Agreement was built on the premise that so long as AT&T satisfies any relevant ordering requirements, SWBT will perform any needed combining activity. (R. Doc. #0009).[12]

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[11] *See generally*, MoPSC Case No. TO-97-40, Commissioner's Examination of SWBT Witness Deere, Tr. 1231, and surrounding discussion (October 16, 1996). *See also* Note 11, below.

[12] The Interconnection Agreement does provide terms and conditions on which AT&T may collocate equipment in SWBT facilities. Collocation provides a means for AT&T to

SWBT's contractual undertaking to combine elements for AT&T (and to leave already-combined elements intact) manifests itself in a number of provisions of the original agreement. That Interconnection Agreement included the following provisions:

- Repeated references to AT&T ordering Network Elements and "Combinations" (Attachment 7, sections 1.3, 1.5)

- When AT&T orders an unbundled local switch port, SWBT will provide access to common-use elements (common transport, tandem switching, signaling) without a separate order (Attachment 7, section 1.5.1)

- SWBT will make connections between AT&T or third-party-supplied facilities and SWBT's network for access to UNEs at any technically feasible point designated by AT&T (Attachment 6, section 2.1)

- The unbundled local switching element will route calls on SWBT's common network (i.e. Common Transport) except as required to fulfill AT&T requests for customized routing (Attachment 6, section 5.2.2)(in other words, SWBT agrees to AT&T's use of local switching in combination with its common transport network and will leave intact the routing tables and trunking connections that combine the local switch with the common transport network)

- "Except upon request, SWBT will not separate requested network elements that SWBT currently combines" (Attachment 6, section 2.8).

SWBT was not compelled by the December 1996 Arbitration Order to include any of

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connect its own equipment to SWBT UNEs. However, as the Special Master has recognized, requiring AT&T to collocate as a prerequisite to combining SWBT elements is prohibited by the 8th Circuit's ruling that a CLEC is not required to own or control any portion of a telecommunications network before being able to purchase UNEs. *See* Joint Statement of Issues Remaining, Special Master's Recommendations on UNE Parity Issues 14b and 16. *See also In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in South Carolina*, FCC CC Docket No. 97-208, Evaluation of the United States Department of Justice at 22 (Nov. 4, 1997) (BellSouth requirement that new entrant collocate its own facilities in a central office in order to combine elements does not permit a finding that BellSouth is offering the nondiscriminatory access to UNEs required by the Act). More to the point here, the AT&T/SWBT Interconnection Agreement does not require AT&T to collocate its own facilities in order to combine one SWBT element with another SWBT element, but provides that SWBT will make those combinations (or leave the already combined elements intact), consistent with SWBT's preference to minimize outsider access to its network.

these provisions. Moreover, it signed the Agreement on October 9, 1997, nearly three months after the Eighth Circuit vacated FCC rules requiring ILECs to combine elements for CLECs and ruled that incumbents such as SWBT could not be ordered to combine network elements. Thus, when SWBT signed the Agreement, it was fully aware that it had no legal obligation to combine elements for CLECs. It was also fully aware of the petition for rehearing it had filed with the 8th Circuit, asking that court to vacate the related FCC rule that prohibited ILECs from disconnecting already-combined network elements. SWBT could have proposed to qualify its commitment to any of the above-listed provisions on the outcome of that petition; it did not. Instead, it agreed to these provisions, for the same reasons that it had agreed all along that it would do the combining -- namely, to restrict direct CLEC access to SWBT network facilities and for its own section 271 purposes. Whatever SWBT's reasons, the crucial fact is that SWBT included these unqualified contractual undertakings in the agreement with AT&T that SWBT signed October 9, 1997.

What SWBT now asks this Court to do is to permit it to escape those contractual undertakings, toss aside over a year's worth of negotiations spent in developing UNE contract terms, refuse to perform any combining activity for AT&T or other CLECs, break apart network facilities that are already in place to serve customers that may be won by new entrants (for the sole purpose of making the new entrants incur the delay and cost of putting them back together), and effectively defer access to any use of UNEs in combination until some indefinite time in the future when terms of CLEC access to SWBT network facilities for purposes of combining elements might be negotiated. SWBT's sole support for this draconian turnabout is the Eighth

Circuit's October 14, 1997 Order on Rehearing,[13] vacating the FCC rule that prohibited incumbents from tearing apart already-combined elements. The PSC was correct in concluding, however, that the Eighth's Circuit Order provides no basis for excusing SWBT its voluntary commitment to combine (and leave intact) network elements for AT&T. December 23, 1997 Order at 22 (R. 1962). That factual finding is unassailable.

First, the Eighth Circuit Order on Rehearing had no impact whatsoever on those provisions listed above that relate to SWBT combining elements that are not connected at the time AT&T orders them. Amended Statement of Issues Remaining, November 26, 1997, UNE Parity Issue 16. The Eighth Circuit had vacated the FCC rules (Rule 51.315(c)-(f)) that required ILECs to undertake such combining activities in its July 18, 1997 ruling, before SWBT executed the Agreement; nothing about that ruling changed with the October 14, 1997 Order on Rehearing. SWBT cannot possibly suggest that it was under any legal compulsion to agree to combine elements for AT&T by virtue of FCC rules that already had been vacated at the time SWBT signed the agreement.

Second, the Order on Rehearing likewise provides no basis for undoing SWBT's agreement that, except upon request, "SWBT will not separate requested Network Elements that SWBT currently combines." Attachment 6, section 2.8 (UNE Parity Issue 3). The PSC was correct that nothing in that Order makes this provision illegal. Nothing in the Order on Rehearing or the Act prohibits an ILEC from **agreeing** with a CLEC that it will not break apart elements that are already connected when the CLEC orders those particular elements.[14] The

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[13] *Iowa Utilities Board v. FCC*, No. 96-3321, Order on Petitions for Rehearing, October 14, 1997.

[14] SWBT acknowledges that there is nothing illegal about the contract language by its proposals in the underlying arbitration "to discuss with AT&T arrangements under which SWBT may agree not to separate such network elements," provided that these discussions

Order held only that the FCC may not impose that requirement by rule. SWBT could have proposed to condition its contractual commitment not to separate elements on the continued existence of FCC Rule 51.315(b); it did not.[15]

Rather, it appears that in Missouri, as in Texas, SWBT evaluated the Eighth Circuit's July 1997 ruling and, taking account of its own objectives (minimizing CLEC contact with SWBT network equipment and facilities, making progress toward section 271 relief), decided to move forward toward a competitive local telecommunications market on the same basis that the parties had understood throughout these negotiations -- SWBT would combine elements rather than have the CLEC do the combining, and it would leave intact already-connected elements ordered

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"would be outside the Telecommunications Act of 1996 and not subject to arbitration." Amended Statement of Issues Remaining at 18. Indeed, in Texas SWBT offered to combine UNEs for AT&T (and to leave already-connected elements intact) if it could extract unregulated, non-cost-based prices in exchange. PUC Docket Nos. 16189 et al, Southwestern Bell's Supplemental Brief on Eighth Circuit Alternatives at 16-20 (Nov. 7, 1997). The Texas Commission decided to hold SWBT instead to commitments that it made to provide combining (and leave connected elements intact) for AT&T at cost-based UNE prices, commitments that SWBT made on the record of arbitration proceedings in that state, after considering the Eighth Circuit's July 1997 ruling. PUC Docket Nos. 16189 et al., Amendment and Clarification of Arbitration Award at 4-6 (Nov. 25, 1997). That decision has now been affirmed. See AT&T v. SWBT, 1998 WL 657717.

[15] The intervening law provision of the AT&T/SWBT Interconnection Agreement does not provide a basis for SWBT to avoid any of the relevant contractual commitments by citation to the Order on Rehearing. The intervening law provision in the signed Agreement, section 3.2 of the General Terms and Conditions, applies only when a court or regulatory agency determines that contract modifications are necessary in order to bring services provided under the AT&T/SWBT agreement "into compliance with the Act." An agreement to combine elements (or leave elements connected) does not raise any compliance issue; as shown earlier, *see* note 9 *supra*, SWBT's own proposals in this arbitration and its offers elsewhere acknowledge that SWBT may lawfully agree to such provisions. Further, the intervening law language that the parties have through this arbitration agreed to add as section 3.1, while technically inapplicable to an event (such as the Order on Rehearing) that predates this revision to the Interconnection Agreement, would not lead to any different result. For that new language applies only to provisions of the contract "required by the Arbitration Award." As shown above, none of the relevant provisions have been required by order of the Commission.

with appropriate specificity.

In Missouri, SWBT's considered commitment to combine elements (and to leave connected elements intact) comes with even more formality than a witness's sworn arbitration testimony. Here SWBT executed the contract that contains those commitments almost three months **after** it had the benefit of the Eighth Circuit's July ruling. The Ohio Commission has reached a similar result, ruling that an ILEC's arms-length contractual commitment to combine elements for a new entrant is enforceable, the rulings of the Eighth Circuit regarding the FCC's combining rules notwithstanding.[16]

The PSC's ruling on this issue does nothing more than enforce the parties' agreement. See SWBT v. AT&T Communications of the Southwest, Inc., at 5 (state commissions have "the authority to determine when a party has a made a deal during the arbitration and to enforce that deal"). At least for the present and some time to come, it represents the only way in which SWBT can meet its obligation to provide nondiscriminatory access to unbundled network elements, for it offered no alternative terms under which Missouri CLECs may have direct access to its network facilities for combining elements. The PSC's ruling is thus essential to the introduction of UNE-based competition in this state. The Court should affirm the Commission's ruling.

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[16] *In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*, Public Utilities Commission of Ohio, Case No. 96-922-TP-UNC, Second Entry On Rehearing at 3 (11/6/97).

IV. THE PSC PROPERLY REQUIRED SWBT TO PROVIDE NETWORK ELEMENTS

A. Dark Fiber

SWBT claims that dark fiber is not a "network element" subject to the Act's unbundling requirements. SWBT Br. at 41. This claim is premised on SWBT's attempt to rewrite the governing statutory language. See MCI Telecomm. Corp. v. BellSouth Telecomm., Inc., 7 F. Supp.2d 674, 680 (E.D.N.C. 1998) ("dark fiber falls clearly within the definition of a network element"). The PSC's ruling should be affirmed.

"Dark fiber" is fiber transmission media which has already been deployed by SWBT but is not currently "lit" or equipped with electronic transmission equipment and is not being utilized to provide service. Interconnection Agreement, Attach. 6, para. 13.1 (R. Doc #16); SWBT Br. at 41. SWBT disagrees with the PSC's determination SWBT should make dark fiber available as a network element under certain conditions. December 11, 1996 Arbitration Order at 10-12 (R. 951). That is unlawful, SWBT contends, because Congress excluded from the definition of network elements all facilities not currently being used by the incumbent. See SWBT Brief at 41.

Congress did no such thing. The Act defines "network element" as any "facility or equipment used in the provision of a telecommunication service," 47 U.S.C. § 153(29), and defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public." Id. § 153(46). The term "network element" must be construed "broadly" to further the Act's purpose of jump-starting local competition by making all elements of the local network available for use by new entrants according to their needs. Iowa Utils. Bd., 120 F.3d

at 809. 811.[17] Congress included no requirement of current use. and thus the Court should not construe it to include that term. See Travis County v. Rylander Inv. Co., 108 F.3d 70, 73 (5th Cir.) (in construing a statute, court should presume that "every word excluded is excluded for a purpose"). reh'g & suggestion for reh'g en banc denied, 114 F.3d 1185 (1997). The Supreme Court has expressly held that such "temporal qualifers" should not be read into a statute. Robinson v. Shell Oil Co., 117 S.Ct. 843, 846 (1997). SWBT's modification is not only inconsistent with the language of the Act, but would also lead to absurd results, allowing an incumbent to avoid providing any access to any facility currently unused—e.g., a customer "loop" to a currently vacant building—even though that facility or equipment is fully capable of being used to provide telecommunications services. That is why every federal court that has reached this issue has concluded that dark fiber is a network element.[18]

SWBT also makes the cursory argument that the new entrant will not be "impaired" without dark fiber. § 251(d)(2)(B). This standard, however, is undemanding. Binding FCC regulations provide that impairment exists if lack of access to the desired network element would "decrease the quality of, [or] . . . increase the financial or administrative cost of, the telecommunications service a requesting telecommunications carrier seeks to offer." 47 C.F.R.

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[17] Accord MCI Telecommunications Corp. v. U S West Communications, Inc., No. C97-1508R, slip op. at 14 (W.D. Wash. July 21, 1998) (rejecting narrow interpretation of "network element"); U S West Communications Inc. v. AT&T Communications of the Pacific Northwest, Inc., No. C97-132OR, slip op. at 15 (W.D. Wash. July 21, 1998) (same); SWBT v. AT&T, 1998 WL 657717, at *5-7 (same).

[18] Accord MCI Telecommunications Corp. v. BellSouth Telecommunications Inc., 7 F.Supp. 2d 674, 680 (E.D.N.C. 1998) (finding that "dark fiber falls clearly within the definition of a network element"); MCI Telecommunications Corp. v. U S West Communications, Inc., No. C97-1508R, slip op. at 14 (W.D. Wash. July 21, 1998); U S West Communications Inc. v. AT&T Communications of the Pacific Northwest, Inc., No. C97-132OR, slip op. at 15 (W.D. Wash. July 21, 1998); SWBT v. AT&T, 1998 WL 657717, at *5-7.

§ 51.317(b)(2); see also Local Competition Order ¶ 285; Iowa Utils. Bd., 120 F.3d at 812. The FCC has rejected the contention that new entrants are not impaired if they can offer service absent access to a given network element. Local Competition Order ¶ 286. Instead, the only relevant inquiry is whether "the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises." Id. ¶ 285 (upheld in Iowa Utils. Bd., 120 F.3d at 812). That standard is easily satisfied here. AT&T's only alternative to leasing SWBT's dark fiber is to install fiber of its own or to lease SWBT's lit fiber with SWBT's electronics. Those two alternatives result in both higher costs and lower quality service than if AT&T had access to dark fiber. Accord SWBT v. AT&T, 1998 WL 657717, at *6 ("[T]he cost of providing services would increase for requesting carriers if they were not allowed unbundled access to dark fiber.").

Finally, the incumbent lawfully may deny access to a requested element only if the incumbent proves there is no "technically feasible point" at which unbundled access is possible. 47 U.S.C. § 252(c)(3); Local Competition Order ¶¶ 198, 205. The standard for establishing technical infeasibility -- unlike the impairment standard -- is quite demanding. An incumbent "must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods" are technically infeasible. 47 C.F.R. § 51.5 (emphasis added) (affirmed in Iowa Utils. Bd., 120 F.3d at 810). Here, it appears that the PSC obviously considered SWBT's arguments regarding technical feasibility because it did not require SWBT to provide access to all dark fiber, and it allowed SWBT to revoke a requesting carrier's right to use dark fiber on 12 months notice. December 11, 1996 Arbitration Order at 10-12 (R. 951). The PSC's ruling should be affirmed.

B. The PSC's Subloop Unbundling Requirement is Well Supported by the Evidence and Law

There is no merit to SWBT's challenge to the PSC's decision to order subloop unbundling. The local loop is the portion of the telecommunications network between SWBT's local office or switch and a customer's premises. 47 C.F.R. § 51.319(a). This loop can be divided into its component "subloop" parts: loop distribution, loop concentrator/multiplexor, and loop feeder. Local Competition Order ¶ 374. Loop distribution is the portion of the local loop that goes from the customer's premises to the loop concentrator/multiplexor. At the loop concentrator/multiplexor, the loop distribution lines from various customer premises are gathered or concentrated into a smaller number of "loop feeder" lines that carry traffic from the loop concentrator/multiplexor to the local office or switch. A competitor with some equipment in place does not require access to the entire loop; instead, it can connect its own facilities directly to loop distribution, thereby bypassing the other portions of the loop.

Contrary to SWBT's representations that the PSC offered "no explanation whatsoever" for its decision to require sub-loop unbundling, the Commission made several specific findings. SWBT Brief at 46. The PSC, in response to the issue of whether SWBT should be required to offer sub-loop unbundling, specifically found that "[t]he availability of an unbundled sub-loop element to [local service providers] LSPs produces economical options for the LSP." December 11, 1996 Arbitration Order at p. 9 (R. 951). The Commission then went a step farther and made specific findings regarding the specific sub-loop elements that SWBT was required to provide access to: loop distribution plant, loop concentrator/multiplexer and loop feeder. Id.

The PSC's determination is not contrary to federal law. As SWBT has noted, "the FCC decided to leave the question of subloop unbundling to the case-by-case judgment of

State commissions based on the specific evidence presented to them by the parties." SWBT Brief at 46. It is clear that AT&T would be impaired without access to subloop elements-- the PSC specifically found that "[t]he availability of an unbundled sub-loop element to LSPs produces economical options for the LSP." December 11, 1996 Arbitration Order at p. 9; see also Iowa Utils. Bd., 120 F.3d at 811 n.31 (impairment established if lack of access "increase[s] the cost of the service sought to be offered."). To resist unbundling, SWBT would have had to prove by clear and convincing evidence that unbundling loop distribution is technically infeasible. See 47 C.F.R. § 51.5; Local Competition Order ¶ 198. SWBT did not met this burden. As explained above, other incumbents are unbundling feeder and distribution elements under interconnection agreements that are being implemented today.[19]

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[19] See, e.g., Application of AT&T Communications of the Southwest, Inc. For Compulsory Arbitration, Cause No. PUD 96000218, Report and Recommendation of Arbitrator at 10 (Okla. Corp. Comm'n Nov. 13, 1996), approved, Order No. 407704 (Dec. 12, 19 ;. Petition of MFS Communications Company, Inc. et al., Docket Nos. 16189 et al., Arbitrator Award at ¶ 8 (Tex. Pub. Utility Comm'n Nov. 7, 1996); Interconnection Agree Negotiation, Docket Nos. 96-01152 et al., Second and Final Order of Arbitration Awar 9-40 (Tenn. Reg. Auth. Jan. 23, 1997); Petition by MCI for Arbitration, Docket No. 68 . Order Ruling on Arbitration at 17-20 (Ga. Pub. Serv. Comm'n Dec. 17, 1996); Petitic MCI Telecommunications and its Affiliate MCImetro Access Transmission Servic e, for Arbitration, Docket No. 16285, Arbitration Award at 8 (Tx. Pub. Util. Comr ov. 7, 1996); Petition of MCI Telecommunications Corp. for Arbitration, Case No. 9 8-TP-ARB, Arbitration Award at 9-11 (Ohio Pub. Util. Comm'n Jan. 9, 1997); Petit MCImetro Access Transmission Services, Inc., for Arbitration, Docket No. ARB6 (US Arbitrator's Decision at 5 (Ore. Pub. Util. Comm'n Dec. 6, 1996); Petition of MCI o Access Transmission Services, Inc. for Arbitration, Docket No. ARB6, Com n Decision at 4 (Ore. Pub. Util Comm'n Jan. 6, 1997); Petition by MCI for Arbi , Case No. 96-431, Order at 15 (Ky. Pub. Serv. Comm'n Dec. 20, 1996); Petition for A tion , Docket No. UT-96-338, Arbitrator's Report and Decision at 36-37 (Wash. Util. ns. Comm'n Jan. 3, 1997); Consolidated Petitions of AT&T Communications of the N st, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Co. f bitration, Docket Nos. P-442, 421/M-96855, et al, Order Resolving Arbitration Issue 9-20 (Minn. Pub. Utils. Comm'n Dec. 2, 1996); Petition of MCI Telec unications Corp. for Arbitration, Application 96-09-012, Report at 28 (Ca. Pub. Utils. Comm'n Dec. 11, 1996); Petitions by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corp and MCImetro Access Transmission Services, Inc. for

In fact, the only evidence that SWBT introduced with respect to technical feasibility consisted of unsupported statements that subloop unbundling might create network reliability issues. See, e.g., Direct testimony of William C. Deere (SWBT) at 25 (Sept. 1996) (Ex. 15) ("the possibility exists for two or more feeder facilities to be cross-connected to a single distribution pair of wires"). Such speculative musings on what "might" (or might not) happen in some circumstances if subloop unbundling were implemented clearly do not constitute the "clear and convincing evidence" of the "specific and significant adverse network reliability impacts" needed to show technical infeasibility. 47 C.F.R. § 51.5; Local Competition Order ¶ 203 (same); id. at ¶ 198 (ILEC must prove "[s]pecific, significant, and demonstrable network reliability concerns").

The PSC's Order requiring SWBT to provide SWBT with access to subloop unbundling is consistent with the Act and binding FCC regulations upheld by the Eighth Circuit. This Court should therefore affirm the PSC's decision.

V. THE PSC PROPERLY REFUSED TO REQUIRE AT&T TO INDEMNIFY SWBT FROM SWBT'S OWN NEGLIGENCE

SWBT seeks to have this Court require AT&T to do what the PSC specifically refused—namely, have AT&T indemnify SWBT for damage to AT&T's customer's caused by SWBT's own negligent actions. SWBT Br. at 48. Because SWBT's proposal would result in anti-competitive, discriminatory and unreasonable treatment of AT&T in violation Section

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Arbitration, Docket Nos. 960980-TP, et al., Final Order on Arbitration at 11-14 (Fla. Pub. Serv. Comm'n Jan. 17, 1997); Petitions by AT&T Communications of the Southern States, Inc., et al. for Arbitration, Docket Nos. 960833-TP, et al., Final Order on Arbitration at 15 (Fla. Pub. Serv. Comm'n Dec. 31, 1996); Petition of MCI Telecommunications Corp., Case No. 96-C-0787, Opinion and Order Resolving Arbitration Issues at 11-12 (N.Y. Pub. Serv. Comm'n Dec. 23, 1996).

251(c)(3) of the Federal Act, the PSC properly adopted AT&T's language.

SWBT suggests that its position is necessary to ensure that it is not compelled to provide AT&T superior access to SWBT's network, and thereby violate the 8th Circuit's decision in Iowa Utilities. But SWBT confirms its obligation to provide AT&T access to network elements equal in quality to that which it provides to itself with the potential consequences of a failure to comply with that obligation. The issue here is not one of superior access, but merely which party should bear the consequences of SWBT's own negligent conduct – SWBT, the negligent party that is in the best position to control its own actions and whose incentive to control its negligent treatment of its competitors is all but eliminated if its competitors must bear SWBT's rightful responsibility for that negligence, or AT&T and AT&T's customers, the innocent parties. The only reasonable answer is SWBT, and in giving that answer, the PSC acted consistently with the terms and core purposes of the Act.

A central purpose of the Federal Act is to eliminate existing barriers to entry, by eliminating the ability of monopoly incumbent LECs such as SWBT to act in ways which create barriers to local entry. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, 11 FCC R. 15499, ¶ 3, 4, 10, 11 and 16 - 19 (1996). SWBT's position here would create perverse incentives for SWBT to continue, and even expand, those barriers. Under SWBT's proposed approach, SWBT would be unconstrained in the opportunity to act negligently in providing services/facilities to AT&T for use in serving AT&T's customers. This is because in so doing, SWBT would suffer no adverse financial or operational consequences. AT&T would be compelled to bear the resulting financial damage as well as the additional consequence of lost consumer confidence and dissatisfied customers. This is not a logical or feasible construction

of the Federal Act. The PSC properly recognized these perverse incentives in rejecting SWBT's proposed language. See December 23, 1997 Report & Order at 39 (R. 1962) ("The Commission acknowledges SWBT's concerns about its exposure to liability but finds that SWBT's proposed system would create much worse incentives. If each party could avoid responsibility for harm that it caused to the other party's customers, there would be little incentive for either party to work together on providing customers with quality service.").

Indeed, SWBT's proposal that it be excused from all liability would permit it to act in a discriminatory fashion relative to AT&T's customers in violation of the requirements of Sections 251(c)(2) and (c)(3) of the Federal Act. Even though SWBT does limit its liability to its customers, it does not eliminate that liability. SWBT's tariff requires that it bear some financial responsibility for damage its negligence causes its customers. SWBT Br. at 48. Under SWBT's proposal, it would have absolutely no financial responsibility for damage caused by negligence toward AT&T's customers. As such, it would have a financial incentive to curb its negligence toward its own customers, while it has no such incentive to treat AT&T's customers in a non-negligent manner, and in fact may have a perverse incentive to treat them negligently and thereby damage its competition.

SWBT's proposal would also impose obligations on AT&T which are unjust and unreasonable in violation of Sections 251(c)(3) of the Federal Act. SWBT is the only party in a position to control the risk of its own negligence. It is reasonable that SWBT bear the consequences of that negligence. It is unreasonable to impose that responsibility on a party such as AT&T that is in no position to prevent the risk. Public policy, and the principles of commercial reasonableness, demand that the financial responsibility associated with a particular risk be imposed on the party in control of that risk.

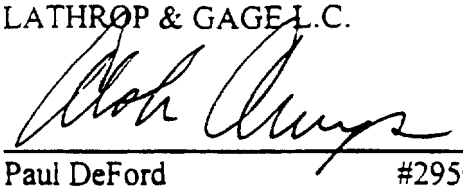
Finally, SWBT makes the bizarre claim that the rates established by the PSC are not cost based and are arbitrary and capricious because they fail to include a recovery for the costs incurred by SWBT as a result of its own negligence. The concept of forward looking economic cost recovery required by the Federal Act is based on the premise that SWBT is entitled to recover from users of its network the economic costs caused by that use. See Local Competition Order para. 685; SWBT v. AT&T, 1998 WL 657717, at *13. The costs resulting from SWBT's own negligence, even when that negligence is directed toward AT&T's customers, can hardly be considered to be caused by AT&T or its customers. SWBT, as the negligent actor, is the cause of those costs, and it is SWBT, not the innocent actors such as AT&T or its customers, that should bear the financial burden of those costs.

CONCLUSION

For the foregoing reasons, and for the reasons stated more fully in AT&T's Opening Brief, AT&T's Motion for Summary Judgment should be granted, and SWBT's Motion should be denied.

Respectfully submitted,

LATHROP & GAGE L.C.



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on the following persons by placing a copy in the U.S. Mail, postage prepaid, this 16th day of November, 1998:

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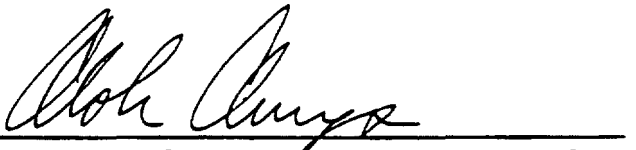

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